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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 213

JOSEPH LAWRENCE MARINO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

---

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Supreme Court of the United States

October 1956 Term

No.

JOSEPH LAWRENCE MARINO,

Petitioner,

—v—

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed his conviction for violation of Sections 173-174 of Title 21, and Section 371 of Title 18, United States Code, with respect to Counts II and IV of the indictment.

(a) The Opinion Below

The opinion of the court below have not yet been officially reported. A copy is hereto annexed (See p. 18 *infra*).

(b) Statement of the Ground of Jurisdiction

(i) The judgment of the Court of Appeals was rendered and entered on June 1, 1956.

(ii) The jurisdiction of this Court is invoked pursuant to 18 U. S. C. Rule 37; and 28 U. S. C. Section 1254.

(c) Questions Presented for Review

1. Does the decision of the Supreme Court of the United States in *U. S.* v. *Costello,* 350 U. S. 359 promulgate a new rule of evidence in criminal trials permitting relevant hearsay evidence.

2. Does the decision of the Supreme Court of the United States in *U. S.* v. *Costello* (*supra*), promulgate a new rule of evidence in criminal trials permitting irrelevant hearsay testimony as held by the Court below in the instant case.

3. May a conviction be sustained against a defendant who has never before been convicted or even arrested; where hearsay and triple hearsay (Trial Judge characterization) is introduced before the jury by the Government to the effect that a Government Agent heard on occasions informer say that the petitioner was a dealer in narcotics as part of the Government's case in chief (p. 56a).

4. May a conviction be sustained where a Government Agent testifies that an informer told him that the informer had heard from a bartender that the petitioner was a narcotics dealer (p. 57a).

Reference to pages are to pages in Appendix of Petitioner in Court below.

5. May a conviction be sustained where the defense in the context of its cross-examination had endeavored to find out if the Agent, as a result of his investigations, had found any proof of any connection between the petitioner and a supplier of narcotics or between the petitioner and any persons connected with the narcotic traffic and the Agent testified that he had not found any such connection and thereafter on re-direct examination by the U. S. Attorney, was it proper, under the cloak of attempting in the language of the Court below "to oppose these tactics of defense" to introduce "whatever evidence the prosecution developed along this line" irrespective of whether or not the evidence was incompetent, irrelevant and hearsay of other crimes.

6. Can the Government, obviously for the purpose of creating prejudice and bias, introduce evidence tending to show criminals frequented the restaurant in which the petitioner worked; that the petitioner's brother-in-law was once arrested, although never convicted; and that the petitioner's sister may have had an affair with a colored man (p. 72a).

7. Can a conviction be sustained where the U. S. Attorney questions the informer and asks him whether or not he, the informer, made purchases of narcotics from persons, not the petitioner, or anyone alleged as acting in concert with the petitioner and that delivery took place in the restaurant where the petitioner was employed (p. 31a).

8. May a Trial Court sit by and permit petitioner's constitutional rights to be frittered away and thus deny the petitioner a fair trial under the Constitution.

9. May a jury find a petitioner guilty of the crime of conspiracy where none of the elements of the crime are present on the theory that jury verdicts can be rationally inconsistent.

(d) Statutes Relied On

Section 174 of Title 21, United States Code, provides, in pertinent part, as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years."

Section 371 of Title 18, United States Code, provides as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

(e) Statement of Case

Petitioner was indicted in an indictment containing four counts. Three of the counts allege sales of heroin on July 17th, October 1st and October 22nd, 1954; and one count alleges conspiracy to sell narcotics. After a trial before the Honorable William B. Herlands, U. S. District Court Judge and jury, petitioner was convicted of the sale of October 1st, and a conspiracy to sell narcotics; and acquitted of the sales of July 17th and October 22nd, 1954.

A special employee (informer) testified that he and the agent went to the restaurant where petitioner worked on July 17th, 1954 and purchased from a woman a package containing heroin and paid her $510.00.

The special employee and the agent also testified that on October 1st, 1954 they went to the same restaurant and ordered five ounces of heroin from petitioner, who told them to look in the phone booth where they would find a package containing heroin. The informer claims he paid petitioner $650.00.

The special employee alone testified that on October 22, 1954 that he ordered from petitioner five ounces of heroin that was given to him by two strangers and that he paid them $650.00.

A raid was made by more than twenty police officers on October 22, 1954 immediately after the informer gave the signal and not one penny of the money that was allegedly paid nor an ounce or trace of any narcotics was found in the restaurant. A thorough fingerprint search of all the packages containing heroin indicated that none of petitioner's fingerprints were on any of the packages. Peti-

tioner took the stand and stated he was innocent. A great deal of the testimony was so incredible and so contradictory so as to conclusively demonstrate petitioner's innocence.

Petitioner had never been arrested for any crime, had been steadily employed and had led an exemplary life.

The defense was that the informer had made the sales on his own account to the Government.

The Government witnesses were the informer, an agent who was with informer part of the time and an agent who testified as to investigations.

On cross-examination of this last witness, petitioner's trial attorney asked if there was any proof connecting petitioner with any source of supply. The agent replied that there was none, and on the following day the agent came into the Court and said he wished to change his answer from "no" to "yes".

The Assistant U. S. Attorney then asked the agent, "Will you tell us what you heard that in any way connected the defendant with narcotics".

This question by the U. S. Attorney was not proper and elicited the prejudicial hearsay testimony found on pp. 56a, 57a; 72a of the Appendix in the Court below.

The Court below affirmed because "the issue was initiated and pressed by petitioner as the very basis of his case to show that he was not the type of young man to engage in the illegal transactions alleged; and whatever evidence the prosecution developed along this line was only such as was proper to oppose these tactics of defense".

(f) Jurisdiction of the Court Below

The District Court had jurisdiction under 26 U. S. C. §145(b). The Court of Appeals had jurisdiction under 28 U. S. C. §1291.

(g) Reasons Relied On

As to Questions 1, 2, 3 and 4:

The Court below has rendered a decision in conflict with every other Court of Appeals, with all State Courts, with every text writer and is even in conflict with its own decisions. It based its decision on the *Costello* case (*supra*), which, if the doctrine of this case stands, will allow the introduction of hearsay evidence in criminal trials, even as far as proof of other crimes where intent, identity, etc., are not necessary elements of the crime.

Prior to the *Costello* case, it was the universal rule in every Court that hearsay evidence was not admissible and certainly not hearsay evidence of other crimes where intent, etc, were not necessary elements of the crime.

A plethora of citations could be given this Court, but are hardly necessary for such an obvious statement of law. As a matter of fact, the Second Circuit has this to say in *U. S.* v. *Sansone*, 206 F 2d 86: "That hearsay as to other crimes required a reversal even though the Judge told the jury to disregard the testimony". In the instant case there was no such instruction.

As to Question 5:

The Court below has rendered a decision in direct conflict with decisions of other Courts of Appeals, in direct

conflict with every leading State case and in direct conflict with every text writer.

The Court below affirmed because "The issue was initiated and pressed by the petitioner as the very basis of his cause; that he was not the type of young man to engage in the illegal transactions alleged and whatever evidence the prosecution developed along this line was only such as was proper to oppose these tactics of defense."

Apparently, the theory of the Court below was that the "door had been opened" by the petitioner and that thereafter the Government had the right to introduce testimony regardless of whether or not it was competent, relevant or hearsay or even hearsay of other crimes.

It is the contention of the petitioner that he did not "open the Door" when in the context of his examination he asked for proof as to any connection between petitioner and any supplier or source of narcotics or any connection between the petitioner and any persons connected with the narcotic traffic.

The theory of completeness merely entitled the Government to offer proof "in combatting these tactics of defense" showing the connection between petitioner and any narcotics or source of supply.

Arguendo that the doctrine of completeness permits an offer of proof of "whatever evidence the prosecution developed along this line", does that allow, under the *Costello* case, the introduction of incompetent, irrelevant and hearsay and hearsay of other crimes.

Dean Wigmore (Evidence, 3rd Edition, Section 2113) in an exposition of the law that has found universal ac-

ceptance states the rule as follows: "The right of the opponent to put in the remainder is universally conceded, for every kind of utterance without distinction; and the only question can be as to the scope and limits of the right.

The ensuing controversies are in effect concerned merely with drawing the line so that the opponent shall not, under the cloak of this conceded right, put in utterances which do not come within its principle and would be otherwise irrelevant and inadmissible. In the definition of the limits of this right, there may be noted three general corollaries of the principle on which the right rests, namely:

"(a) No utterance, irrelevant to the issue, is receivable.

(b) No more of the remainder of the utterance than concerns the same subject and is explanatory of the first part, is receivable.

(c) The remainder thus received merely aids in the construction of the utterance as a whole and is not in itself testimony."

A very good statement of the rule was given by the Court of Appeals of the State of New York in *People* v. *Schlessel*, 196 N. Y. 476:

> "There is no tenable theory of 'opening the door' which sanctions the reception of evidence neither relevant to the issue nor to facts in issue".

It is humbly suggested that the Court below was confused by the brief of the Government that the petitioner was "attempting to establish through a Government Agent, his unblemished reputation".

Dean Wigmore, in Section 1849 of his treatise on Evidence, states the universal rule which can be found on

page 19 of Petitioner's Brief in the Circuit Court of Appeals. The authorities are collected on pages 19 to 24.

These authorities establish the rule that character can only be put in issue by a defendant when he introduced affirmative proof of good character; that such character evidence requires a necessary predicate and must be based on reputation and not on specific acts.

The attorney for petitioner was not asking testimony of petitioner's character of someone who was incapable and unable to testify as to petitioner's character (the Government agent) and the Government is in error when it presupposes that character evidence can ever be introduced without a proper predicate.

The Government has sought to justify the introduction of this hearsay of other crimes by a question out of context with 1500 other pages of testimony. That question was "When you went there, you found nothing detrimental about the character of the defendant, did you? Answer: No, sir."

A long line of questioning before this had sought to confine the agent to proof. Petitioner's attorney in the Trial Court had asked for proof connecting petitioner with any source or supplier of narcotics. This did not call for a hearsay answer. If the petitioner was a dealer in narcotics it could very well have been within the realm of proof for the investigator to definitely connect up the petitioner with the narcotics dealer or supplier.

The petitioner's attorney, at the trial, limited the answer called for to those other than Government Agents

or Special Employees. (See page 51a of Appendix to Appellant's Brief.)

Actually, the Agent was confined "to other than law enforcement officers that were working on this case and any other people that were assisting us" (See page 16a of the Appendix to Brief of the United States of America.) Certainly the hearsay as to other crimes of informers could not be urged by the Government on the theory of completeness.

May I also humbly suggest to this Court that in the trial lasting many, many days and containing 1418 pages of testimony an inadvertent question by a trial counsel should not be made the basis of destroying our concepts of a fair trial especially in view of the fact that the entire line of questioning had asked for proof.

As to Question 6:

If some of this record seems incredible, may we humbly suggest to this Court that this trial actually occurred and that the evidence itemized in Question 6 was actually introduced in the trial of this case.

It is hardly necessary to characterize this evidence before this learned Court. It is hardly necessary to cite cases that this constituted a deprivation of petitioner's constitutional rights to a fair trial.

As to Question 7:

The obvious reason for the Assistant U. S. Attorney asking the informer whether he made purchases from persons other than the petitioner and not connected with the petitioner but at the place where the petitioner worked,

was to attempt to create prejudice and bias so as to deny petitioner the right to a fair trial.

This issue was not initiated and pressed by the petitioner and was obviously plain and prejudicial error, but the lower Court maintained that no exception was taken of this plain and prejudicial error.

The Supreme Court in *Viereck* v. *U. S.*, 318 U. S. 236, at page 248, has stated the rule of law that the integrity of the judicial progress requires where the liberty of a citizen is involved and the fault in the trial is so radical, that it may well be noticed and corrected by the Court without objection, exception or assignment.

As to Question 8:

If this Court is so-minded and does grant Certiorari in this case, attorney for the petitioner herein can demonstrate to this Court that in more than 100,000 criminal trials instituted yearly in the City of New York, less than 10% have paid counsel. The others are either assigned without fee, or are Legal Aid Society defense counsels. We do not attempt to imply that these members of the Bar do not do their best for these clients, or that the members of the Legal Aid Society do not conscientiously and earnestly try to defend these men to the best of their ability, but in the nature of things, it is impossible to defend 10 or 12 clients each day adequately without proper preparation, and in 90% of the cases in the City of New York this is how a defendant's rights are protected.

In the instant case the questions asked by the defense attorney were so highly improper and prejudicial that it

was the duty of the Court as in *U. S.* v. *Katz*, 78 Fed. Supp. 35 at 439, to see that a fair trial was given petitioner.

As far as petitioner's attorney's experience in most Courts, the procedure adopted by Judge Murphy in *U. S.* v. *Katz* (*supra*) should be made mandatory, "Defense counsel thus injected the fact that defendant had been charged with another crime. It should not have been developed. We excused the jury and admonished defense counsel. The jury was then recalled and instructed that defendant was to be tried on the charge before them and that charge alone."

This Honorable Court has stated the same rule in *Querica* v. *U. S.*, 289 U. S. 466 at 469.

Probably the most important question in this whole appeal is this practical question, since 90% of all defendants in criminal trials have only token counsel to comply with constitutional requirements. The obvious reason, of course, is that most people charged with crime have no money to pay counsel. Practically lack of money means that a defendant is deprived in many cases of his constitutional rights to a fair trial. Practical considerations may make it impossible to judge each case on whether defense attorney did an adequate job, but at least this Court ought to rule that a Trial Judge may not sit by and allow a defendant's rights to be impaired and infringed.

In *U. S.* v. *Ragen*, 166 F 2d 976 at 980, Circuit Court of Appeals for the 7th Circuit said: "Whenever the Court in good faith appoints or accepts the appearance of a member of the bar in good standing to represent a defendant, the presumption is that such counsel is competent. * * *

The constitutional requirements have been met as to the necessity for counsel. If the action of counsel in the presence of the court in the conduct of the trial reduces the trial to a travesty on justice, such conduct might be considered on the proposition that such a trial was a denial of due process."

As to Question 9:

It is most humbly suggested to this Court that the Court below was in error in presupposing that petitioner urged that the conspiracy count was inconsistent. Rather, petitioner urged that the elements of the conspiracy count were not present. It is in the nature of things impossible for a man to conspire with himself (Cardozo, *J.*, in *Morrison* v. *California*, 291 U. S. 82).

Under the first count of the indictment alleging a substantive crime of sale charging the petitioner with one Jane Doe as acting in concert, the petitioner was acquitted.

As to the third count of the indictment charging the petitioner alone with a substantive crime of sale, the petitioner was acquitted.

Under the second coun of the indictment charging the petitioner alone with a sale, he was convicted.

There is no other evidence in this case to support the contention that any persons conspired or had an agreement to sell narcotics except for the first count for which petitioner was acquitted.

It is humbly submitted that the acquittal was *res judicata* on that issue. *Sealfon* v. *U. S.*, 322 U. S. 575.

The Government, in its brief to the lower Court, stated its opinion: "That the jury, in rendering its verdict on two counts alone, was expressing its decision not to base a conviction upon the testimony of the special employee uncorroborated by the testimony of a narcotics agent."

The testimony under the second count does not prove that petitioner acted in concert with anyone nor was there any proof of a conspiracy, an agreement, combination or confederation to sell narcotics. Agreed that there need not be any rational consistency in the verdicts of a jury, but a jury may not convict unless the essential elements of the crime are proved beyond a reasonable doubt.

In this particular case, the point raised by the petitioner was that none of the elements of a conspiracy were alleged or proved.

CONCLUSION

It is respectfully submitted that the various questions raised are of such fundamental importance in the demonstration of criminal law that there should be an authoritative determination of the same by this Court.

Accordingly, petitioner asks that this Court issue a Writ to Review the Judgment of Affirmance herein.

Respectfully submitted,

ARNOLD SCHILDHAUS
Counsel for Petitioner

Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 383—October Term, 1955.

(Argued May 11, 1956 Decided June 1, 1956.)

Docket No. 23937

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

JOSEPH LAWRENCE MARINO,

Defendant-Appellant.

Before:

CLARK,

Chief Judge,

FRANK and HINCKS,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, William B. Herlands, *Judge.*

Joseph Lawrence Marino appeals from his conviction for selling and conspiring to sell heroin. Affirmed.

Appendix

DENNIS C. MAHONEY, Asst. U. S. Atty. for the Southern Dist. of N. Y., New York City (Paul W. Williams, U. S. Atty., New York City, on the brief), *for plaintiff-appellee.*

HERBERT S. SIEGEL, New York City, *for defendant-appellant.*

PER CURIAM:

Since there was ample evidence to support defendant's conviction for selling heroin and conspiring to violate the federal narcotic laws, he centers his attack on this appeal on a claim of error in the admission of "hearsay" of other crimes of defendant. Admittedly no exception was taken at the trial; he now asks us to take note of it as plain and prejudicial error. But the issue was initiated and pressed by the defendant as the very basis of his case to show that he was not the type of young man to engage in the illegal transactions alleged; and whatever evidence the prosecution developed along this line was only such as was proper to oppose these tactics of defense. Defendant obviously was entitled to pursue this course when he thought it beneficial, and cannot now complain if it was not successful.

But one other matter deserves mention: a claim of alleged inconsistency in the conviction on the conspiracy count, while the jury found for defendant on two of the three substantive counts alleging sales of the drug. We need not stop to consider whether or not the jury's actions are subject to a practical rationalization, since it is well settled that it is not the function of appellate review to look for or require rational consistency between verdicts of a jury. See *United States* v. *Costello,* 2 Cir., 221 F. 2d 668, 676, citing cases, affirmed *Costello* v. *United States,* 350 U. S. 359.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of June one thousand nine hundred and fifty six.

Present:

HON. CHARLES E. CLARK,
Chief Judge,
HON. JEROME N. FRANK,
HON. CARROL C. HINCKS,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

JOSEPH LAWRENCE MARINO,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Judgment

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

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CITATIONS

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393510—56

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 213

JOSEPH LAWRENCE MARINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 149–150; Pet. 17) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 1, 1956 (R. 151; Pet. 18–19). The petition for a writ of certiorari was filed on June 28, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the admission in evidence of hearsay testimony, showing petitioner's complicity in narcotics transactions other than those charged, constituted

prejudicial error where such testimony was evoked by petitioner's opening up of the subject of his reputation in cross-examining a government agent.

2. Whether the trial court's admission in evidence of narcotics transactions by persons other than petitioner constituted prejudicial error where such evidence tended to prove the conspiracy charged.

3. Whether there was sufficient evidence to support petitioner's conviction of conspiracy.

STATEMENT

After a jury trial on an indictment in four counts, petitioner was found guilty under counts two and four, which charged him with a sale of heroin on October 1, 1954, in violation of 21 U. S. C. 174, and with conspiring with others to sell narcotics.[1] He was sentenced to serve concurrent terms of imprisonment of three years each on counts two and four, and in addition was fined $1.00 on count two, the payment of which was remitted (R. 122–123). The Court of Appeals affirmed *per curiam* (R. 151; Pet. 16–17).

The evidence adduced by the government may be summarized as follows:

About 10:00 A. M. on July 17, 1954, special government employee Jenkins went with federal narcotics agent Crouch to the Red Rose Cafe in New Rochelle, New York. On entering, Jenkins asked the bartender if petitioner was there. The bartender replied that he was not but that he had left word for Jenkins to stand by the jukebox. After a while petitioner enter-

[1] He was acquitted on two counts charging illegal sales on July 17 and October 22, 1954.

ed the cafe and greeted Jenkins. (R. 5–6, 125).) Jenkins returned to Crouch who had been sitting at the bar and told him what had happened (R. 6, 20). A woman then walked up to them and handed Crouch a package, saying (R. 6, 32) "Joey sent you this package". Crouch asked her how much they owed her, and when she replied $510, he paid her that amount. (R. 6–7, 9, 32). When the woman left, the two men went to the men's room and opened the package, which they found to contain an envelope of white powder (R. 9). Upon analysis, the powder was found to contain heroin hydrochloride (R. 58–59).

Jenkins returned to the Red Rose Cafe on September 29, 1954, where he again talked with petitioner, telling him that he, Jenkins, expected a man from out of town for whom he would like to purchase some heroin. Petitioner replied that he had about 8 ounces of heroin on hand. He said he would sell it for $130 an ounce if the man would be interested, and, if so, to return on October 1st. (R. 10.)

On October 1, 1954, Jenkins and Crouch went back to the cafe and talked with petitioner, who was tending bar (R. 11, 22, 23, 26). Jenkins told petitioner that the last supply of "stuff" was of insufficient quantity and inferior, and asked him to explain the reason for this to Crouch, whom he introduced as his "man" (R. 11, 27, 32). Petitioner replied that the heroin was all right when it left his hands (R. 11, 33). The two men ordered 5 ounces from petitioner, who told them to wait five minutes and then left (R. 11). On his return, he told them they could pick up the order in the first telephone booth, but he asked

first to be paid. When they insisted on seeing what they were getting before paying, he told them to get it, look at it in the men's room, and if they approved, shake hands with him on the way out and in that way pass him the money. (R. 11–12.) Crouch went into the booth, picked up the package from the floor, and, with Jenkins, went to the men's room where they found the package to contain an envelope of white powder (R. 12–13), which again proved to be heroin hydrochloride. (R. 58–59.) On the way out of the cafe with Crouch, Jenkins passed petitioner $650 as he was shaking hands with him (R. 13, 33).

On October 22, 1954, Jenkins returned to the cafe about 11 o'clock in the evening and ordered another 5 ounces from petitioner, who told him he would have to wait until 11:45 before he could be served. At the appointed time, Jenkins entered an entertainment room in the rear of the cafe, where he was greeted by a man whom he did not know and who said, "I understand that you want to do some business". (R. 13.) Jenkins replied, "yes", and the man ushered Jenkins to a table, where they were met by a second man (R. 13–14). The first man handed Jenkins the package, and said (R. 14), "Here are your five ounces. You give me $650." After looking at the heroin, Jenkins paid over the money and left the cafe (R. 14, 15).

ARGUMENT

1. During the cross examination of narcotics agent Rudden, defense counsel went into considerable detail questioning him about his investigation of petitioner: how extensive was the investigation, did it cover

investigation of the criminal records of petitioner and his family, what was petitioner's reputation, and the like. Rudden's response to all these questions was that the investigation revealed nothing detrimental to petitioner (R. 136–138). Thereafter, the following occurred (R. 50–51, 139):

> Q. Now you spoke to all of these drug addicts for the purpose of ascertaining if Joe Marino ever sold narcotics, isn't that right, or dealt in narcotics? A. It was not the only purpose, sir.
>
> Q. That was the real purpose, wasn't it? A. Not particularly, sir.
>
> Q. Well, was it one of the purposes? A. Yes, sir.
>
> Q. Now, did any of you—I don't know who you spoke with—did any of them say the defendant dealt in narcotics? A. No, sir.
>
> * * * * *
>
> Q. There was not an outside source that you investigated that you spoke with to try to find out something about Marino who said that Marino was implicated or dealing in narcotics; is that correct? A. What do you mean by outside, sir? You mean other than the law enforcement officers that were working on this case and any other people that were assisting us?
>
> Q. Yes. A. My answer is no, then, sir.
>
> Q. It is "No"? A. Yes, sir.

When Rudden resumed the witness stand after a recess he said (R. 52):

> The Witness: Your Honor, if I may, I would like to make a correction on my testimony of yesterday, insofar as the question that was put

> to me by attorney Falk [defense counsel]. The question, I believe, was did I know from any outside source or did I hear from any outside source if Joe Marino was dealing in narcotics. I would like to change the answer from "no" to "yes".

Defense counsel did not pursue the subject any further at that time. However, on Rudden's redirect examination, the following occurred (R. 56):

> Q. Agent Rudden, do you recall Mr. Falk asking you yesterday whether or not any outside sources had ever told you anything that in any way involved the defendant in this case with narcotics and you recall your answer yesterday afternoon was "No"? A. Yes, sir.
>
> Q. This morning you came into court and said you wished to change that answer to "Yes"? A. That is correct, sir.
>
> Q. Will you tell us what you have heard that in any way connected this defendant with narcotics?
>
> Mr. Falk. *Go ahead.* [Emphasis added.]

Rudden then testified, without objection, that he had been informed by a special agent of the Bureau of Narcotics, one Irene Insull, that she had negotiated a heroin "buy" with petitioner, and that he had also been told of another instance when petitioner had used government witness Jenkins to make a purchase of cocaine (R. 56, 142). He also testified that Jenkins told him that bartender Walter had told him [Jenkins] "that there was something involving narcotics as far as Ann Chieco [petitioner's sister who owned the cafe] and Joseph Marino were concerned, but

Walter stated that if it were something it had to be big" (R. 144).

On recross examination, defense counsel pursued the line of inquiry about Jenkins' conversation with bartender Walter (R. 57–58). Later, when the judge observed that some of the foregoing testimony was triple hearsay, and noted the fact that defense counsel had in the first instance "opened the door" to this line of questioning and that is why it "went in", defense counsel agreed to this observation (R. 146). Subsequently, petitioner took the stand in his own defense and testified as to his good reputation and character (R. 82–86).

Petitioner attributes (Pet. 7–8) reversible error to the trial court's admission in evidence of agent Rudden's hearsay testimony as to the defendant's reputation for dealing in narcotics. But it is clear from the portions of the record which we have quoted and cited that a good part of Rudden's cross examination by defense counsel was directed to showing that the extensive investigation which was made by the government concerning petitioner's life and reputation failed to produce any derogatory information about him. Defense counsel had announced in his opening statement that this would be his line of defense; he told the jury that he was going to prove that petitioner had never associated with drug peddlers and that no one had ever heard of petitioner "dealing in narcotics" (R. 124). Counsel's closing statement was along the same line (R. 148). Once petitioner opened this line of inquiry—expressly asking for hearsay as to his reputation, associations, dealings, etc.—he could

not prevent the government from exploring the same line; and it is clear from the record that the hearsay the government was permitted to elicit, without objection, did not go beyond counteracting this tactic of the defense.

As this Court stated in *Michelson* v. *United States,* 335 U. S. 469, 479, "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." Since petitioner's defense had broadly portrayed him as having a reputation as an honest and law-abiding citizen, basic fairness dictated that the prosecution should be permitted to meet this strategy by adducing the same type of hearsay defense counsel had invited by his own cross examination. See also *Walder* v. *United States,* 347 U. S. 62; *United States* v. *Rossi,* 219 F. 2d 612 (C. A. 2), certiorari denied, 349 U. S. 938; *United States* v. *Pagano,* 224 F. 2d 682 (C. A. 2), certiorari denied, 350 U. S. 884.[2]

[2] Petitioner's contention (Pet. 2, 7) that the court below has adopted the rule of the recent *Costello* case, 350 U. S. 359, for the trial of criminal cases is absurd.

Equally unworthy are his observations (Pet. 12–14) concerning the defense of persons charged with crime in the City of New York and his charge that, because of indigence, "90% of all defendants in criminal trials have only token counsel to comply with constitutional requirements" (Pet. 13), which he couples with an insinuation that trial counsel, Mr. Falk, was derelict in his duty in the line of defense he adopted and that the trial judge was equally derelict in not stopping Mr. Falk. Mr. Falk apparently was retained by petitioner. He said in his summation before the jury (R. 148): "I set about trying this case in the most unorthodox manner of my whole career. * * * And suffice it to say that my recol-

2. In examining its witness Jenkins on direct examination, the government questioned him about the narcotics transactions which he had at the cafe with persons other than petitioner. Petitioner did not object at that time, but now contends (Pet. 11–12) that the admission of such evidence constituted prejudicial error. But the evidence as a whole shows that petitioner was involved in those transactions, and the testimony was therefore directly pertinent to the conspiracy count. It tended to show that petitioner's activities were not isolated transactions but were part of a large narcotics operation involving other participants at the cafe. See the Statement, *supra,* pp. 3–4.

3. Finally, petitioner contends (Pet. 14–15) that there was insufficient evidence to support his conviction of conspiracy, principally because he was acquitted on the only substantive count which charged that he acted jointly with another person. But his conviction on one of the substantive counts, which he does not challenge for insufficiency of the evidence, supports the concurrent sentences of three years which were imposed on it and the conspiracy count. *Hira-*

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lection of the courts goes back 47 years. * * * I wanted him to take that stand and I wanted you to know what his life has been, and then I felt that you could judge for yourselves if the defendant was the type of young man who would consciously, willingly and knowingly lend himself to the transactions of which he has been accused." The government's brief in the Court of Appeals informs us that Mr. Falk is "an able and experienced trial lawyer who has conducted an active trial practice in the courts of this State for almost forty years." Present counsel's hindsight and his notions of what the defense strategy should have been hardly furnish a proper basis for his charges of woeful incompetence of trial counsel and denial of due process by the trial judge.

bayashi v. *United States*, 320 U. S. 81, 85; *Pinkerton* v. *United States*, 328 U. S. 640, 641–642, fn. 1. In any event, our summary of the evidence (*supra*, p. 2–4) shows that there were other participants in some of the transactions at the cafe. Petitioner's acquittal on the counts involving those transactions did not preclude consideration of the evidence concerning them in deciding his guilt under the conspiracy count. As the court below pointed out (Pet. 17), consistency in a jury's verdict is not required.[3]

[3] Petitioner's assertion (Pet. 3) that the trial court erred in admitting in evidence the criminal record of petitioner's brother-in-law is without substance. Such evidence was elicited from agent Rudden by defense counsel on cross examination (see R. 48–49, 52–53, 140–141). Petitioner's further complaint (Pet. 3) that evidence tending to show that "criminals" frequented the Red Rose Cafe was erroneously admitted apparently refers to the prosecutor's cross examination of Murray Howell, the manager of the cafe (R. 66). But Howell had testified on direct examination that only "nice people" visited the cafe; and the prosecutor's interrogation as to whether certain named persons frequented the place (R. 72–75) was legitimate cross examination on this phase of Howell's testimony. Petitioner cites no supporting record reference for his charge that the prosecutor introduced evidence that "petitioner's sister may have had an affair with a colored man" (Pet. 3). She was a witness for the defense (R. 77) and on cross examination she was questioned about her relations with Howell (R. 80–82), who preceded her as a defense witness (R. 67). Apparently, petitioner has reference to this cross examination, although it does not appear that Howell is a Negro. The full text of the sister's and Howell's direct examination is not reproduced in the record and it is difficult to ascertain the relationship of the cross examination to matters brought out by the defense as part of its case. In any event, there was no objection to this line of cross examination and it did not show an "affair".

CONCLUSION

The petition for a writ of certiorari presents no question meriting further review by this Court. It should be denied.

Respectfully submitted.

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